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REC'D TN  
REGULATORY AUTH  
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February 19, 2002  
EXECUTIVE SECRETARY

David Waddell  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243

Re: Show Cause Proceeding Against TalkCom, Inc.

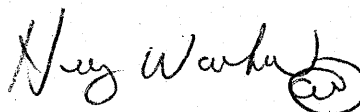
Docket No: 01-00216

Dear David:

Enclosed please find the original and thirteen copies of an Initial Response of Talk.Com and Motion to Dismiss.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:   
Henry Walker

HW/CW

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

**IN RE:**

**SHOW CAUSE PROCEEDING  
AGAINST TALK.COM, INC.**

**Docket No. 01-00216**

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**MOTION TO DISMISS OF TALK.COM**

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1. Respondent Talk.com Holding Corp. ("Talk.com" or "the Company"),<sup>1</sup> pursuant to Tenn. Comp. R. & Regs. 1220-1-2-03, hereby files this Motion to Dismiss certain alleged violations cited by the Tennessee Regulatory Authority ("TRA" or "Authority") in its *Order Requiring Talk.com to Appear and Show Cause Why a Cease and Desist Order and/or Fine Should Not Be Imposed*, dated November 8, 2001 (hereinafter referred to as the "Show Cause Order.").

2. Specifically, Talk.com moves that the TRA dismiss, for lack of subject matter jurisdiction, twenty-seven (27) complaints (Counts 65-76 and 79-93)<sup>2</sup> cited in the Show Cause Order for which the TRA alleges the Company to be in violation of Tenn. Code. Ann. § 65-4-125(b) and the rules promulgated by Ten. Comp. R. & Regs. 1220-4-2-.58. Talk.com also

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<sup>1</sup> On April 9, 2001, Talk.com Holding Corp. changed its name to Talk America Inc. On May 7, 2001, Talk.com filed a request for name change to the TRA. On June 12, 2001, the Directors voted to defer a ruling on Talk.com's request to change its name and the TRA issued an order deferring such on October 12, 2001. *See Order Deferring a Ruling on Talk.com Holding Corp's Notice of Name Change* Docket No. 01-00410. Outside of Tennessee, Talk.com does business under the name "Talk America" in all states except Indiana (local service request pending; long distance name change approved) and Texas (name change awaiting final approval).

<sup>2</sup> Please note that a substantive response for Counts 77 and 78 has been provided in the *Initial Response of Talk.com* filed simultaneously with this Motion.

moves for dismissal of Counts 31-32, on the basis of the prior final settlement of issues contained in that complaint in the Settlement Agreement between the Consumer Services Division ("CSD") and the Company's affiliate, Access One Communications, Inc. ("Access One"), approved by the TRA on September 18, 2000.<sup>3</sup>

3. In support of this Motion, Talk.com states as follows:

I. **INTRODUCTION AND SUMMARY**

4. By its Show Cause Order in this docketed proceeding, the TRA directed Talk.com to show cause why it should not be penalized for alleged violations of various TRA rules and statutes. Among the allegations in the Show Cause Order are twenty-nine (29) counts in which the TRA has alleged that Talk.com billed and collected charges for services unauthorized by the customer, or in excess of the tariffed amount, in direct violation of Tenn. Code. Ann. § 65-4-125(b) (hereinafter the "cramming" statute) and the rules promulgated by Ten. Comp. R. & Regs. 1220-4-2-.58.

5. As discussed herein, Talk.com respectfully requests that the Authority dismiss twenty-seven (27) out of the twenty-nine (29) cramming counts contained in the Show Cause Order due to the lack of subject matter jurisdiction of the TRA over such complaints.<sup>4</sup> These Counts, hereinafter referred to as the "Interstate Cramming Allegations" encompass Counts 65-76 and 79-93 of the Show Cause Order. It is the Federal Communications Commission ("FCC"), not the TRA, which has exclusive jurisdictional authority over the billing and collection practices

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<sup>3</sup> See *In re Access One Communications*, Order Approving Settlement Agreement, Docket No. 00-00687 (Sept. 18, 2000)

<sup>4</sup> The remaining two complaints, Counts 77 and 78, relate to former local and intraLATA customers of Access One Communications, Inc. ("Access One"). These customers appear to have selected local and intraLATA calling plans from Access One and thus do not fall under the same category as the other 27 cramming complainants, who were  
(continued...)

of carriers relating to interstate communications services or to jurisdictionally mixed bundles of interstate and intrastate communications services such as those contained in the Interstate Cramming Allegations of the Show Cause Order. Accordingly, the "Interstate Cramming Allegations" of the Show Cause Order should be dismissed.

6. Talk.com also respectfully requests that the TRA dismiss Counts 31-32 of the Show Cause Order as this complaint relates to a cause of action of alleged unauthorized switching by Access One that occurred prior to September 18, 2000, the date upon which the CSD and Access One entered into a final settlement of all allegations or potential allegations of unauthorized switching against Access One.

## **II. ARGUMENT**

### **A. COUNTS 65-76 AND 79-93 OF THE SHOW CAUSE ORDER AGAINST TALK.COM SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION OF THE TRA OVER THESE COMPLAINTS**

7. In its Show Cause Order, the TRA cites to twenty-nine (29) cramming complaint counts against the Company, alleging that the Company's actions with respect to each of those twenty-nine (29) complaints violate the provisions of Tenn. Code. Ann. § 65-4-125(b) and Ten. Comp. R. & Regs. 1220-4-2-.58. As noted above, this Motion addresses the "Interstate Cramming Allegations," Counts 65-76 and 79-93.

8. Tenn. Code. Ann. § 65-4-125(b) provides as follows: "No telecommunications service provider, and no person acting on behalf of any telecommunications service provider, shall bill and collect from any subscriber to telecommunications services any charges for services to which the provider or person acting on behalf of the provider knows or reasonably

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(...continued)

provided service by Talk.com of jurisdictionally-mixed calling plans or bundled packages of service.

should know such subscriber has not subscribed, or any amount in excess of that specified in the tariff or contract governing the charges for such services.” Ten. Comp. R. & Regs. 1220-4-2-.58(3) prohibits providers from submitting charges for telecommunications services on a telephone bill without first having obtained the prior consent of an authorized individual.<sup>5</sup>

9. The TRA's jurisdiction, however, applies solely to intrastate charges within the State of Tennessee.<sup>6</sup> The TRA's rules are not applicable to the “Interstate Cramming Allegations” cited by the TRA in its Show Cause Order because none of these complaints relate to charges for intrastate services provided by the Company pursuant to tariffs on file in the State of Tennessee. Rather, all of these complaints relate to the Company's billing of jurisdictionally-mixed bundled package of intrastate and interstate services – either in the form of an intrastate and interstate long distance telephone service plan or in the form of a bundled package of intrastate and interstate local and long distance services, such as Talk.com's United Calling Plan.<sup>7</sup> The billing of these jurisdictionally-mixed services is not separated into intrastate and interstate services. As a result, the Company's billing practices for such services and the cramming complaints filed against the Company with respect to such billing practices are not severable into separate intrastate and interstate actions.

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<sup>5</sup> Please note that this section of the TRA's rules appears to be the only section relating to any of the twenty-nine (29) cramming complaint counts cited by the TRA in its Show Cause Order.

<sup>6</sup> See 47 U.S.C. § 151, Tenn. Code. Ann. § § 65-4-105(a) and 65-3-102 (excluding interstate commerce from the TRA's jurisdiction).

<sup>7</sup> Under this bundled plan, a customer receives the following features: basic local telephone service, unlimited local calling, unlimited regional (intraLATA) calling (the rates for which vary from state to state), interstate calling at 5¢ per minute and free member-to-member long distance calling (up to 1000 minutes per month) for a total monthly fee ranging from \$46.95 to \$48.95, depending on the zone, plus applicable taxes and regulatory surcharges.

10. Accordingly and as demonstrated in this Motion, the FCC -- not the TRA -- has the exclusive jurisdictional authority to regulate the Company's billing and collection practices with respect to jurisdictionally-mixed services. Indeed, the TRA expressly has acknowledged that its "[j]urisdiction only covers complaints within our state's borders. Complaints concerning services provided between states . . . are best referred to the appropriate federal agency."<sup>8</sup> Accordingly, the "Interstate Cramming Allegations" should be dismissed for lack of subject matter jurisdiction.

**1. Talk.com Offers Only Jurisdictionally Mixed Bundles of Communications Services To Its Customers**

11. The FCC, among others, long has recognized the inherent value in a carrier's ability to offer bundled packages of services and products to its customers.<sup>9</sup> The FCC specifically has found that bundling, the offering of two or more products or services at a single price, typically less than the sum of separate prices, "encourages competition by giving carriers flexibility both to differentiate themselves from their competitors and to target segments of the consumer market with product offerings designed to meet the needs of individual customers."<sup>10</sup> Talk.com has designed its calling plans precisely for these reasons. In order to satisfy consumer demand for quality communications services at affordable prices and in attractive packaged offerings,

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<sup>8</sup> See <http://www.state.tn.us/tra/index.htm>, Mission Statement of the Consumer Services Division.

<sup>9</sup> *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Report and Order, CC Dockets 96-61, 98-183 at ¶ 1 (rel. Mar. 30, 2001) (stating that allowing common carriers to offer consumers bundled packages of telecommunications services and customer premises equipment at a discounted price benefits consumers by enabling them to take advantage of innovative and attractive packages of services and equipment).

<sup>10</sup> *Id.* at ¶ 14.

Talk.com offers its customers a variety of bundled packages of local and long distance telephone services.

12. For example, in the State of Tennessee, Talk.com offers two bundled calling plans, both of which include local exchange, intraLATA and interstate long distance services. The first plan, the "Freedom Plan," which no longer is marketed by the Company, includes 200 free domestic long distance minutes for a higher price than the Company's more recent plan, the "United Plan," which does not include any free long distance minutes but has lower monthly rates. These packages are not jurisdictionally severable – *i.e.* they cannot be separated into intrastate calling plans versus interstate calling plans – because, as with all service offerings by Talk.com, these bundled packages contain both interstate *and* intrastate service elements, which are not separately priced or offered. Talk.com has specified in its local exchange tariffs, including in its Tennessee local exchange tariff, that it offers local exchange service "only as part of a bundle or package of telecommunications services to residential customers."<sup>11</sup>

13. Talk.com's bundled offerings, because they include jurisdictionally-mixed services, are offered pursuant to the Company's interstate rate and service offerings. The FCC has required non-dominant interexchange carriers to detariff their domestic interexchange service offerings.<sup>12</sup> Accordingly, Talk.com's bundled service plans are set forth on the Company's web site at [www.talk.com](http://www.talk.com), in its Rates, Terms and Conditions ("RTC") document and also in its local and long distance calling plan hypertext links on the web site, through which a customer may determine whether a particular calling plan is offered in its area and select the plan of his/her

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<sup>11</sup> See Rules, Regulations, and Schedule of Rate and Charges Applicable to End User, Local Exchange Telecommunications Services, Furnished by Talk.com Holding Company d/b/a The Phone Company Within the State of Tennessee, Tennessee Tariff No. 5 at pg. 115 (effective date Mar. 22, 2001) ("Talk.com Tennessee Local Tariff").

<sup>12</sup> 47 C.F.R. § 61.19(a).

choosing. The plan currently marketed to customers in the State of Tennessee is appended hereto as *Exhibit A*.<sup>13</sup>

**B. THE FCC HAS EXCLUSIVE AUTHORITY OVER BILLING REGULATIONS ASSOCIATED WITH JURISDICTIONALLY MIXED COMMUNICATIONS SERVICES**

**1. Background of Federal/State Dual Regulatory Scheme**

14. Pursuant to the bifurcated federal and state regulatory structure in the United States, jurisdiction over interstate and international commerce constitutionally is vested in Congress,<sup>14</sup> which in turn has delegated its authority over communications largely to the FCC. Regulation of intrastate commerce, reserved to the states under the United States Constitution, and of communications in particular, has been delegated to state regulatory authorities, including the TRA, pursuant to each state's own statutory authority.<sup>15</sup> The Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act") further established a system of dual state and federal regulation over telephone service, granting to the FCC the broad authority to regulate "interstate and foreign commerce in wire and radio communication,"<sup>16</sup> while reserving for the states the authority to regulate charges, classifications, practices, services, facilities, or regulations "for or in connection with *intrastate* communication service by wire or radio . . . ."<sup>17</sup>

15. The FCC has jurisdiction under both Title I and Title II of the Communications Act to regulate the manner in which common carriers such as Talk.com bill and collect for their own

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<sup>13</sup> For informational purposes, Talk.com also has set forth the bundled packages available to customers in the State of Tennessee in the Company's Tennessee Local Exchange Tariff, the relevant sections of which are appended hereto as *Exhibit B*. See *Talk.com Tennessee Local Tariff* at 115-116.2. The bundled services set forth in this tariff, however, are provisioned pursuant to Talk.com's interstate service offerings.

<sup>14</sup> U.S. CONST. art. I, § 8.

<sup>15</sup> *Supra* n.6.

<sup>16</sup> 47 U.S.C. § 151.



interstate services offerings.<sup>18</sup> Congress clearly vested the FCC with exclusive jurisdiction over the regulation of interstate communications charges pursuant to 47 U.S.C. § 201(b), which authorizes the FCC to prescribe rules and regulations necessary to ensure that “all charges, practices, classifications and regulations for and in connection with [interstate and foreign] communications service, shall be just and reasonable.”<sup>19</sup> The FCC has emphasized that “[a] carrier’s provision of misleading or deceptive billing information is an unjust and unreasonable practice in violation of Section 201(b) of the Act,”<sup>20</sup> and, to this end, has used its express authority under the Act on many prior occasions to address allegations of unreasonable billing practices of telecommunications carriers.<sup>21</sup> Moreover, Talk.com has records of multiple instances in which Tennessee customers filed billing complaints against the Company with the FCC with respect to jurisdictionally-mixed services -- oftentimes in addition to complaints filed

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(...continued)

<sup>17</sup> 47 U.S.C. § 152(b) (emphasis added).

<sup>18</sup> 47 U.S.C. §§ 151, 201(b). See also *In re Truth-in-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 98-170, 14 FCC Rcd. 7492 at ¶ 25 (rel. May 11, 1999) (“Truth-in-Billing Order”); *In re Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 12 FCC Rcd 1632 at ¶¶ 31-32 (1997); *In re Detariffing of Billing and Collection Services*, 102 FCC 2d. 1150 at ¶ 2 (1986).

<sup>19</sup> 47 U.S.C. § 201(b). See also *Federal Communications Commission, Consumer Facts: Unauthorized, Misleading or Deceptive Charges Placed on Your Telephone Bill – Cramming*, [www.fcc.gov/cib/consumerfacts/cramming.html](http://www.fcc.gov/cib/consumerfacts/cramming.html) (Sept. 21, 2001) (stating that “for charges related to telephone services between two states or internationally, you should contact the FCC”).

<sup>20</sup> See *Truth-in-Billing Order* at ¶ 24; see also 47 C.F.R. § 64.2400 *et seq.*

<sup>21</sup> See *Kiefer v. Paging Network*, 24 CR 1213 (2001); *Halprin, Temple, Goodman and Sugrue v. MCI Tel. Corp.*, 14 FCC Rcd 21092 (1999); *Brooten v. AT&T Corp.*, 12 FCC Rcd 13343 (1997).

with the TRA for the same allegations.<sup>22</sup> In none of these cases did the FCC choose not to review the billing complaint and instead to refer it to the TRA.

16. In addition to its jurisdictional authority over billing practices for purely interstate services, the FCC also has exclusive jurisdiction over the billing of jurisdictionally mixed packages of communications services, such as those offered by Talk.com to customers in the State of Tennessee. In the seminal case of *Louisiana Pub. Serv. Comm'n v. FCC*, the Supreme Court made it clear that: (1) where the FCC is acting within the scope of its exclusive authority and (2) where state regulation stands as an obstacle to valid federal communications policies, the FCC may preempt state regulation where it is not possible to separate the interstate and intrastate components of the asserted FCC regulation.<sup>23</sup> Each prong of this test is addressed below.

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<sup>22</sup> See billing complaints filed against Talk.com by John Appling, BTN 901-278-8900, Nancy Ford, BTN 901-925-7870; Bruce Efflandt, BTN 423-428-6001; Christopher Bush, BTN 931-485-2158; Cathey Parshall, BTN 423-391-4381.

<sup>23</sup> *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 374-75 and n.4 (1986) ("Louisiana PSC"). See also *California v. Federal Communications Comm'n*, 39 F.3d. 919 (9<sup>th</sup> Cir. 1994) ("California v. FCC") (declaring that the FCC was entitled to preempt state regulations because it had met its burden of showing that its regulatory goals of authorizing the integration of services would be negated by the state regulations it had preempted); *Maryland Pub. Serv. Comm'n v. Federal Communications Comm'n*, 909 F.2d. 1510 (D.C. Cir. 1990) (finding that the Communications Act permits the FCC to preempt the states from setting rates charged by local exchange carriers to interexchange carriers for disconnection of local telephone bills); *North Carolina Utils. Comm'n, v. Federal Communications Comm'n*, 552 F.2d. 1036 (4<sup>th</sup> Cir. 1977) (holding that the FCC has jurisdiction to prescribe the conditions under which terminal equipment may be interconnected with the interstate telephone line network even though such equipment also is used for local communication and despite the contention that federal control of interconnection over the national network will deprive the states of meaningful rate-making power); *North Carolina Utils. Comm'n, v. Federal Communications Comm'n*, 537 F.2d. 787 (4<sup>th</sup> Cir. 1976) (holding that the FCC's declaratory statement of its primary authority over interconnection of customer-provided telephone terminal equipment within the national telephone network was a proper and reasonable assertion of its jurisdiction that unavoidably affects intrastate as well as interstate communication, and that Section 152(b) of the Communications Act does not sanction any state regulation that encroaches substantially upon the FCC's authority under Sections 201-205 of the Communications Act).

17. First, the FCC has used its express authority under Section 201(b) of the Act to establish specific *Truth In Billing* rules governing common carrier billing practices in general and cramming in particular.<sup>24</sup> The FCC's Consumer Information Bureau established a Cramming Consumer Fact Sheet, <http://www.fcc.gov/cib/consumerfacts/cramming.html>, which specifies that "for charges related to telephone service between two states or internationally, you should contact the FCC," and an on-line complaint form, FCC Form 475, to assist consumers with filing general complaints against carriers regarding billing disputes and cramming, among other issues. As established above, the FCC clearly is acting within the scope of its Congressionally-delegated authority under 47 U.S.C. § 201(b) where it regulates the billing practices of common carriers, including those relating to "cramming," the placing of unauthorized charges on a consumer's telephone bill for services and products.

18. Second, it is not possible to sever the billing aspects of bundled services into interstate and intrastate components. As previously stated, Talk.com bills all of its calling plan features at a single price – interstate and intrastate services are not separately billed. Because the Company's billing practices are not severable into interstate and intrastate actions, it is impossible to simultaneously apply separate sets of billing rules – state and federal – to its jurisdictionally-mixed service plans.

19. The FCC has established *Truth In Billing* regulations expressly designed to further the important federal policy of reducing the recent, substantial increase in cramming complaints nationwide, which the FCC has found to have risen out of customer confusion concerning charges on their telephone bills.<sup>25</sup> These *Truth In Billing* regulations apply to both bundled and

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<sup>24</sup> *Id.* See also *Telecommunications – State and Federal Actions to Curb Slamming and Cramming*, GAO Report (July 27, 1999).

<sup>25</sup> See *Truth In Billing Order* at ¶ 3.

unbundled services and to local as well as long distance carriers. Significantly, both the states as well as the FCC found federal action over carrier billing practices to be imperative: "Virtually every state and consumer advocacy group that commented in this proceeding urges us to take action to address the growing problem of consumer confusion with their telephone bills."<sup>26</sup>

20. Permitting states to regulate the billing of bundled services necessarily would conflict with the FCC's jurisdictional authority over billing of communications services. The particular conflict between the state and federal policies in this area stems from the fact that the FCC specifically has chosen to regulate the billing and collection practices of telecommunications carriers offering both unbundled and bundled telecommunications services, while the TRA also is attempting to regulate such practices for the same type of services, including interstate service. To permit such a system of dual regulation would result not only in the unnecessary and burdensome duplication of regulation of the same services, but also in the imposition of innumerable conflicting billing and collection requirements on communications carriers from potentially fifty one (51) different regulatory authorities, with which it simply would be impossible for carriers to comply. Moreover, such a situation could result in the creation of different cramming standards at the state and federal level based on differing definitions of "cancellation," "violation" and "knowledge" of improper billing practices. Further, this situation also could negate the FCC's valid regulatory goal of eliminating customer confusion with respect to their telephone bill charges.<sup>27</sup>

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<sup>26</sup> *Id* at ¶ 4 and n.10.

<sup>27</sup> *See California v. FCC* at 933 (permitting the FCC to preempt state regulations where it had shown that conflicting state rules regarding access to CPNI would negate the FCC's goal of allowing the BOCs to develop efficiently a mass market for enhanced services for small customers).

21. Of equal importance, the FCC found that its authority to enact the *Truth In Billing* rules was derived not only from Section 201(b) of the Act, but also from Section 258 of the Act, which governs unlawful changes in subscriber carrier selections.<sup>28</sup> This is important because while states are free to adopt additional regulations for intrastate services *consistent with* the guidelines and principles established by the FCC in the *Truth In Billing Order*, the FCC did not choose expressly to delegate any jurisdictional authority to the states with respect to cramming, as it did with respect to slamming.<sup>29</sup> This lack of parallel delegation of statutory authority over cramming confirms that states may regulate billing and collection in general and cramming in particular only with respect to intrastate services. As noted above, the TRA's own website acknowledges that the TRA has no authority over interstate communications services.<sup>30</sup> The converse is not true, as the FCC has jurisdictional authority over intrastate communications service where the test established by the Supreme Court in *Louisiana Pub. Serv. Comm'n v. FCC* has been met.

22. In sum, the FCC has chosen to exercise its lawful authority under the Act to establish rules that serve as the final authority for the billing and collection of telecommunications carrier services. With state authority limited to the regulation of intrastate services only, any attempt by the TRA to regulate the interstate services of Talk.com, including those services that are bundled and thus, jurisdictionally inseverable, causes clear conflict with federal regulation in this area. Accordingly, the first two (2) prongs of the Supreme Court's preemption test as set forth in *Louisiana Pub. Serv. Comm'n v. FCC* have been met.

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<sup>28</sup> 47 U.S.C. § § 201(b), 258.

<sup>29</sup> See 47 C.F.R. § 64.1110.

<sup>30</sup> *Supra* n.8.

23. While the precise nature of the billing of jurisdictionally-mixed bundles of communications service offerings has not heretofore been addressed by the FCC or the courts, such services logically must be considered interstate in nature under either one of two tests established by the FCC to address instances of jurisdictionally-mixed traffic or service: (1) the "ten percent (10%)" rule; and (2) the "jurisdictional inseverability" rule.

## **2. The Jurisdictional Inseverability Rule**

24. First, under the "jurisdictional inseverability" test set forth the *BellSouth Memory Call* decision, the FCC determined that where a service, such as voice mail, is a jurisdictionally-mixed service that cannot be separated into distinct jurisdictional portions, state regulations over such a service will be preempted.<sup>31</sup> In the *BellSouth Memory Call* decision, the FCC preempted an order by the Georgia commission that froze BellSouth's voice mail service and prevented BellSouth from providing its voice mail service to new customers in the State of Georgia.

25. In the *BellSouth Memory Call* decision, the Georgia commission contended that the voice mail service was purely an intrastate service offering because it could be separated into two (2) distinct jurisdictional transactions: (1) one from the caller to the telephone company switch that routes the call to the intended recipient's location (a transaction that could be intrastate or interstate); and (2) one from the switch forwarding the call to the voice mail apparatus and service, a transaction that purely is intrastate.<sup>32</sup> The FCC disagreed, finding that BellSouth's voice mail service was jurisdictionally-mixed, and that it was impossible to separate the interstate and intrastate provision of the service without impermissibly barring the interstate

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<sup>31</sup> *In re Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1619 at ¶¶ 4, 7 (rel. Feb 14, 1992).

<sup>32</sup> *Id.* at ¶ 8.

provision of the service.<sup>33</sup> Accordingly, the FCC preempted the Georgia Commission's "freeze" of BellSouth's voice mail service offering as thwarting the FCC's public interest objectives of adopting a comprehensive regulatory framework for enhanced services. In doing so, the FCC noted that it has jurisdiction over and regulates charges for the local network "when it is used in conjunction with origination and termination of interstate calls," and made it clear "[t]hat it had not ceded jurisdiction over call forwarding when used in interstate communications even if that service is locally tariffed."<sup>34</sup>

26. Additional FCC case law also supports the preemption of state regulation in instances of jurisdictional severability and where federal public interest objectives would be thwarted if the state regulation was permitted to govern. For instance, in the *Caller ID* proceeding, the FCC preempted state regulation of Caller ID that prohibited the offering of interstate CPN (Calling Party Number)-based services, required blocking alternatives on interstate calls that differed from those adopted by the FCC and required blocking systems that interfered with the FCC's adopted method of using \*67 to achieve blocking.<sup>35</sup> The FCC did so because it found CPN-based services to be "jurisdictionally-mixed services," and that it is impractical and uneconomic to require the development and implementation of a dual blocking capability on the same line that would permit both the federal per call blocking system adopted by the FCC and state per line blocking systems."<sup>36</sup>

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<sup>33</sup> *Id.* at ¶ 7.

<sup>34</sup> *Id.* at ¶ 12. Accordingly, the mere fact that Talk.com has tariffed its bundled packages of service in its local tariff for informational purposes is legally insufficient to provide the TRA with any jurisdictional authority over the billing of these bundled services.

<sup>35</sup> *In re Rules and Policies Regarding Calling Number Identification Service – Caller ID, Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking*, CC Docket No. 91-281 at ¶ 16 (rel. May 5, 1995) ("Caller ID Order").

<sup>36</sup> *Id.* at ¶ 62.

27. Likewise, in its *Intercarrier Compensation* proceeding, the FCC also found that where interstate and intrastate traffic components cannot reliably be separated, traffic properly is classified as interstate and falls under the Commission's Section 201 jurisdictional authority.<sup>37</sup> Moreover, in the universal service context, the FCC specifically has acknowledged the problems inherent in a carrier's ability to distinguish and allocate revenue between different types of bundled services.<sup>38</sup>

28. In this case, it is impossible to jurisdictionally separate Talk.com's billing practices where complaints regarding those practices are based upon a jurisdictionally-mixed bundle of intrastate and interstate services, and where the allegations contained therein are not and cannot be limited to either the intrastate or the interstate service purchased by the customer from Talk.com. Rather, such billing complaints relate in general to the billing practices of Talk.com and as such, cannot be separated by jurisdiction.

29. For example, out of the "Interstate Cramming Allegations," fifteen (15) (Counts 65, 66, 67, 69, 72, 79, 80, 82, 83, 84, 85, 86, 88 and 89) relate to allegations of billing by Talk.com after the customer had cancelled service with the Company.<sup>39</sup> Such complaints do not allege that the Company failed to cancel the customer's intrastate service(s) only. Another nine (9) (Counts 70, 73, 74 75, 76, 81, 90, 91 and 92) complaints relate to allegations of billing for calling plan features or rates not selected by the customer. These complaints are not alleging actions relating

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<sup>37</sup> *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 and *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket No. 99-68, at ¶ 52 (rel. Apr. 27, 2001).

<sup>38</sup> *FCC Takes Next Step to Reform Universal Service Fund Contribution System*, News Release at 1 (Feb. 14, 2002).

<sup>39</sup> Counts 65 and 74 also allege that the Company failed to provide them with 200 free domestic interexchange minutes and/or free months of AOL Internet service.



to intrastate service(s) only. Indeed, they could not, as Talk.com does not offer separate intrastate calling plans. The remaining four (4) (Counts 68, 71, 87 and 93) relate to allegations that they were billed for services never provided by Talk.com. Again, because all calling plans offered by Talk.com contain an interstate component, the complaints do not and cannot relate only to intrastate service.

30. Accordingly, given that all of the “Interstate Cramming Allegations” relate to billing practices for calling plans consisting of both intrastate and interstate communications services, and that, as such, the Company’s billing practices are incapable of being jurisdictionally severed, the FCC lawfully may preempt the regulation of the billing practices relating to such services, where the FCC’s public interest objectives would be thwarted if the TRA otherwise was permitted to regulate.

### **3. The Ten Percent Rule**

31. Second, under the ten percent (10%) rule established by the FCC in the *MTS/WATS Order* (also known as the “mixed-use facilities rule”) the costs of “mixed use” lines carrying both state and interstate traffic are assigned to the interstate jurisdiction where such lines carry more than a *de minimis* amount (*i.e.* more than 10%) of interstate traffic on the line.<sup>40</sup> To this end, Section 36.154 of the FCC’s rules characterizes as jurisdictionally interstate those private lines and WATS lines that carry both state and interstate traffic “[i]f the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line.”<sup>41</sup>

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<sup>40</sup> *In re MTS and WATS Market Structure, Amendment of Part 36 of the Commission’s Rules and Establishment of a Joint Board*, Decision and Order, CC Docket Nos. 78-72, 80-286 (rel. July 20, 1989) (“MTS/WATS Order”); *see also* 47 C.F.R. § 36.154.

<sup>41</sup> 47 C.F.R. § 36.54.

32. The *GTE ADSL Order* likewise supports this proposition. This case involved GTE's tariffing of a service in its federal special access tariff designed to allow ISPs to provide their end user customers with high-speed access to the Internet.<sup>42</sup> The FCC investigated the tariff offering to determine whether it constituted an interstate access service and thus was properly tariffed at the federal level.<sup>43</sup> The FCC agreed with GTE that its ADSL service was similar to a traditional private line service in that both services may carry interstate and intrastate traffic.<sup>44</sup> Because GTE's ADSL service offering necessarily involved more than a *de minimis* amount of Internet traffic destined for websites in other states or countries, even though it may not be possible to ascertain the destination of any particular transmission, the FCC concluded that GTE's ADSL service was subject to federal jurisdiction under the FCC's "mixed-use facilities" or ten percent rule.<sup>45</sup>

33. As discussed previously, every one of the complainants in the "Interstate Cramming Allegations" accepted service from Talk.com pursuant either to an intrastate and interstate long distance calling plan, or to a bundled packaged offering of intrastate and interstate local and long distance services from the Company. Because the Company does not assess a per minute value to its local exchange service offerings, but instead offers them as part of the overall monthly price of the bundled plan, the Company does not bill customers on total usage measurements. However, using the standard set forth in the *GTE ADSL Order*, there is a likelihood that more

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<sup>42</sup> *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order, CC Docket No. 98-79 (rel. Feb. 26, 1999) at ¶ 1 ("GTE DSL Order").*

<sup>43</sup> *Id.* at ¶ 3.

<sup>44</sup> *Id.* at ¶ 25.

<sup>45</sup> *Id.* at ¶ 26.

than ten percent (10%) of the value of the calling plan chosen by each customer is jurisdictionally interstate.

34. For example, twenty-one (21) of these complainants (Counts 65, 67, 68, 69, 70, 72, 73, 75, 76, 80, 81, 82, 83, 84, 85, 86, 89, 90, 91, 92, 93) selected to receive a bundled package of local and long distance services from Talk.com. In the overwhelming majority of these cases, the complainant received, as part of its package, 200 minutes of interstate long distance service.<sup>46</sup> This offering has a stand-alone market value of 9.5 cents per minute for a total of \$19.00. The monthly cost of this package ranged from \$57.95 to \$62.95, depending on zone. Accordingly, viewed as a percentage of total revenue, the interstate value of this packaged service offering was anywhere from 30% to 33% of the total value of the service offered – a percentage that is far more than is necessary to classify the bundled services as jurisdictionally interstate under the FCC's ten percent (10%) rule.

35. The remaining six (6) complainants elected to receive a long distance calling plan (consisting of interstate and intrastate toll service) from Talk.com. Unlike its local bundled packages, for long distance calling plans, the Company bills customers on total usage measurements and therefore is able to determine that for those customers with interstate usage, the interstate component of their long distance service likewise satisfies the ten percent (10%) rule.

36. While such analysis undoubtedly addresses the value of jurisdictionally-mixed services billed to the customer, as compared with the jurisdictionally-mixed traffic usage identified in the *MTS/WATS Order* and *GTE ADSL Order*, the FCC has made it clear that

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<sup>46</sup> Malisha Blackman (#86) and William James (#90) received 100 free long distance minutes under the Talk.com bundled business plans they selected, while Patricia Gatley (continued...)

jurisdictional separations “[i]s not an exact science and the procedures involved must reflect administrative and other practical concerns . . . between the jurisdictions.”<sup>47</sup> In the absence of direct precedent as to the jurisdictional nature of the billing of jurisdictionally-mixed bundled services, it is evident that subjecting the billing services provided in the Interstate Cramming Allegations to the FCC’s jurisdictional authority is both logical and consistent with case law precedent where the value of the interstate portion of such jurisdictionally mixed services clearly exceeds ten percent (10%).

37. For all of the reasons previously set forth in paragraphs 17 and 18 of this Motion, the FCC’s objectives in establishing a comprehensive framework to govern the billing and collection practices of common carriers providing intrastate, interstate and bundled services would be hindered if the TRA or any state commission was permitted to regulate the billing practices of jurisdictionally-mixed bundled services. Indeed, as the Fourth Circuit has noted, the Communications “[A]ct must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole.”<sup>48</sup>

38. Accordingly, all prongs of the test established in *Louisiana Pub. Serv. Comm’n v. FCC* have been met and the Interstate Cramming Allegations of the TRA’s Show Cause Order should be dismissed.

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(...continued)

(#91) received a 10% discount off of her local telephone bill and a \$21.95 credit issued to her long distance charges after two months of billing on Talk.com’s service.

<sup>47</sup> *MTS/WATS Decision* at ¶ 7.

<sup>48</sup> *See General Telephone Co. of California v. Federal Communications Comm’n*, 413 F.2d. 390, 398, *cert. den.* 396 U.S. 888 (1969).

**C. THE DISMISSAL OF INTERSTATE CRAMMING ALLEGATIONS AGAINST TALK.COM SIGNIFICANTLY REDUCE THE TRA'S PROPOSED PENALTY AND FURTHER DEMONSTRATE THE HIGHLY SUBJECTIVE STANDARD THE TRA HAS USED IN THIS CASE**

39. A dismissal of the Interstate Cramming Allegations relating to alleged violations of Tenn. Code. Ann. § 65-4-125(b) against Talk.com would result in a reduction of 4889 days of continued billing violations against the Company, thereby reducing the maximum proposed penalty set forth in the Show Cause Order by \$4,889,000.00, to \$4,026,000.00.

40. This sum is so unconscionably large because the TRA has chosen to apply the maximum possible standard of \$1000 per day for each day of the alleged cramming violations<sup>49</sup> and because the TRA has interpreted "any such violation" of Tenn. Code. Ann. § 65-4-125(f) to mean each and every day following the first date on which a bill allegedly was issued after the customer's cancellation or for an improper or unauthorized rate or service. Accordingly, the proposed penalty against Talk.com for the alleged cramming violations *alone* therefore amounts to more than \$180,000.00 per complainant. Such a subjective and unquestionably expansive interpretation resulting in the imposition of vastly unwarranted sums of this nature only gives further credence to the FCC's jurisdictional authority over jurisdictionally-mixed cramming complaints, because the FCC employs a far more evenhanded and judicious approach to assessing penalties against common carriers – and one far more suited to the nature of the allegations made.<sup>50</sup> Moreover, potentially forty-nine (49) other state commissions could employ

<sup>49</sup> Tenn. Code. Ann. § 65-4-125(f).

<sup>50</sup> See, e.g. 47 C.F.R. § 1.80, which sets forth a maximum fine of \$40,000.00 per unauthorized instance of slamming and permits the FCC to issue a higher or lower fine using the adjustment criteria set forth in this section. In practice, the FCC interprets the submitting or executing of an unauthorized carrier change as a *single instance of slamming*. See *Initial Response of Talk.com* at 72. Accordingly, an allegation of slamming is viewed by the FCC as a one-time Act – a position directly contrary to the TRA's interpretation of cramming as a continuous daily violation. See also the penalties (continued...)

their own subjective standards as to what constitutes a cramming "violation," thereby resulting in the costly and impossible compliance issues for carriers referred to herein.

**D. COUNTS 31-32 OF THE SHOW CAUSE ORDER AGAINST TALK.COM SHOULD BE DISMISSED PURSUANT TO THE SETTLEMENT AGREEMENT BETWEEN THE TRA AND ACCESS ONE**

41. Counts 31-32 of the Show Cause Order pertain to a customer, Joe and Rose Matthews d/b/a Matthews Towing and Car Care Center, File No. 00-2039, whose complaint of unauthorized switching relate to alleged acts of Talk.com's affiliate, Access One that occurred prior to September 18, 2000, the date on which a final settlement between the CSD and Access One with respect alleged unauthorized switching by Access One that had occurred prior to that date was approved by the TRA.<sup>51</sup>

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(...continued)

that the FCC has assessed to date against carriers for failure to contribute to the universal service fund ("USF"), pursuant to its ad hoc formula for such violations. 47 U.S.C. 503(b)(2)(B) allows the FCC to assess on common carriers a penalty of up to \$110,000 for each violation or each day of a continuing violation, up to a statutory maximum of \$1,100,000 for a single act of failure to act. This statute requires the FCC to consider relevant factors to each case, including the nature, circumstances, extent and gravity of the violation, the degree of culpability of the violator, history of prior offences and such other matters as justice may require. For failure to contribute to the USF, the FCC has devised a formula that consists of two components: (1) a base penalty of \$20,000.00 per violation for failure to contribute to the USF in a timely manner; plus (2) an amount equal to one half of the unpaid universal service contributions, which may be adjusted on an upward or downward basis where warranted. *To date, the FCC has regarded a "continuing violation" of failure to contribute to the USF to be, at most, a two month period*, which has resulted in a maximum imposition of a base penalty of no more than \$40,000.00 on any carrier, even where the carrier has failed to contribute to the USF for a period of years and even where the carrier owes close to a million dollars to the USF. See *In re PTT Telekom, Inc.*, Notice of Apparent Liability for Forfeiture, File No. EB-01-IH-0035 at ¶ 7 (rel. Mar. 29, 2001), *In re Advanced Telecom Network, Inc.*, Notice of Apparent Liability for Forfeiture, File No. EB 00-IH-0241 at ¶ 7 (rel. Apr. 20, 2001); *In re North American Telephone Network, LLC*, Notice of Apparent Liability for Forfeiture, File No. EB-00-IH-0054 at ¶ 8 (rel. Aug. 4, 2000).

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The relevant date is September 18, 2000, the date of the TRA's approval of the settlement agreement because prior to that date, the agreement was considered a proposed, non-final agreement, which was incorporated into the TRA's September 18 approval order "as if fully rewritten herein." See *In re Access One Communications, Order Approving Settlement Agreement*, Docket No. 00-00687 at 2 (Sept. 18, 2000).

42. On January 31, 2000, the Company received authorization from Rose Matthews, in the form of a third party verification tape, to switch the local, local toll and long distance service for billing telephone number ("BTN") (901) 388-3316. The tape recording the authorization of the switch of service for Rose Matthews previously was provided to the TRA on October 31, 2000, after the Company received notice of the Matthews' complaint. This was the sole authorization of Ms. Matthews received by Talk.com.

43. The transcript of Rose Matthews' verification indicates that Ms. Matthews clearly authorized the switch of her telephone service and that there was no reason for the Company to believe that it did not have authorization to switch the service. The Matthews' began billing on Talk.com's service on March 17, 2000. Regardless of these facts, however, because this complaint relates to an alleged act of unauthorized switching against Access One prior to September 18, 2000, the date on which the Settlement Agreement was approved and deemed final by the TRA, by the terms of that Agreement, it must be dismissed.

44. The Settlement Agreement specifies that "[a]ll complaints of unauthorized switching of local service that were *or might have been prosecuted by the CSD against Access One* or its officers, employees or agents *pertaining to conduct engaged in prior to the date of this Agreement* are hereby settled."<sup>52</sup> Because the Matthews complaint relates to an alleged act of unauthorized switching by Access One that occurred prior to the date of the Settlement Agreement and that might have been prosecuted by the CSD prior to that time, it must be dismissed. The terms of the Agreement are clear – "conduct engaged in prior to the date of this [Settlement] Agreement" has been resolved. It is of no consequence that Ms. Matthews may have waited for some months to file her complaint; that she could have done so and that CSD

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<sup>52</sup> *Id.* at ¶ 8.5 (emphasis added).

could have prosecuted the complaint is the standard upon which all such complaints must be judged.

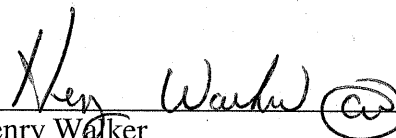
### III. CONCLUSION

WHEREFORE, for the reasons cited, Talk.com requests that the Authority dismiss from its Show Cause Order: (1) Counts 65-93 cited therein, due to the Authority's lack of subject matter jurisdiction over billing complaints arising from interstate and jurisdictionally mixed bundles of communications services; and (2) Counts 31-32 cited therein, pursuant to the terms of the TRA's Settlement Agreement with Access One.

Respectfully submitted,

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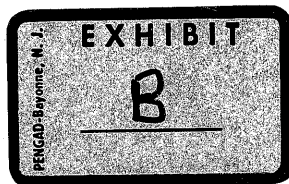
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Dated: February 19, 2002



**SECTION 6.0 - LOCAL SERVICES PRICE LIST, (CONT'D.)**

**6.3 Residential Bundled Local Service**

**6.3.1 General**

- A. The Company offers basic local exchange service only as part of a bundle or package of telecommunications services to residential Customers. (T)

- B. End-User Common Line (EUCL) Recovery Charge

The following charge applies to recovery of End User Common Line charges billed to the Company by the Incumbent LEC.

Primary Line Residence, Per Line	\$4.35
Non Primary Line Residence, Per Line	\$6.95

(D)  
(D)

- C. Combination Charge

A Combination Charge applies to each line to allow the Company to combine elements into a service offering available to Customers in the State of Tennessee.

	<u>Monthly</u>
UNE-P Combination Charge	\$10.00
Total Resale Combination Charge	\$10.00

- D. Reserved for Future Use.

(D)  
|  
|  
|  
(D)

- E. Feature Installation Charge

When the Local Bundle Customer adds Custom Calling or CLASS features to an existing service or to an additional line, a nonrecurring charge applies per order, per line.

Nonrecurring Charge, Per Order, Per Line:	\$10.00
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Issue Date: February 20, 2001

Effective Date: March 22, 2001

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6805 Route 202  
New Hope, Pennsylvania 18938

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**SECTION 6.0 - LOCAL SERVICES PRICE LIST, (CONT'D.)**

**6.3 Residential Bundled Local Service, (cont=d.)**

**6.3.2 Local Bundle I**

**A. Local Bundle I includes the following services:**

200 minutes of interLATA long distance service;

All Custom Calling and CLASS (except Voice Mail, Three Way Calling and Custom Ringing and excluding the custom calling features that are priced on a per call basis); and

(T)

(D)

Unlimited Local Calling.

(T)

**B. Usage Charges**

For interLATA toll calls in excess of allowance, see TALK.com=s toll tariff for Long Distance Bundle No. 1.

(T)

**C. Monthly Recurring Charge:**

Zone 1:	\$69.95
Zone 2:	\$74.95
Zone 3:	\$74.95

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**SECTION 6.0 - LOCAL SERVICES PRICE LIST, (CONT'D.)**

**6.3 Residential Bundled Local Service, (cont=d.)**

**6.3.3 Local Bundle II**

**A. Local Bundle II includes the following services:**

All Custom Calling and CLASS (except Voice Mail, Three Way Calling and Custom Ringing and excluding the custom calling features that are priced on a per call basis);

(D)

Unlimited IntraLATA Calling; and

Unlimited Local Calling.

**B. Usage Charges:**

Usage charges for InterLATA calling are found in the applicable TALK.com tariffs for Long Distance Bundle No. 2.

**C. Monthly Recurring Charge:**

(T)

Zone 1:	\$44.95
Zone 2:	\$48.95
Zone 3:	\$48.95

(R)

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(R)

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**SECTION 6.0 - LOCAL SERVICES PRICE LIST, (CONT'D.)**

**6.3 Residential Bundled Local Service, (cont=d.)**

**6.3.4 Local Bundle III**

**A.** Local Bundle III includes the following services:

200 minutes of long distance service;

(T)

All Custom Calling and CLASS (except Voice Mail, Three Way Calling and Custom Ringing and excluding the custom calling features that are priced on a per call basis);

(D)

Unlimited Local Calling.

(T)

**B.** Usage Charges

For interLATA toll calls in excess of allowance, see TALK.com=s toll tariff for Long Distance Bundle No. 3.

**C.** Monthly Recurring Charge:

Zone 1:	\$54.95
Zone 2:	\$59.95
Zone 3:	\$59.95

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**SECTION 6.0 - LOCAL SERVICES PRICE LIST, (CONT'D.)**

**6.3 Residential Bundled Local Service, (cont=d.)**

**6.3.4 Local Bundle IV**

**A. Local Bundle IV includes the following services:**

200 minutes of long distance service;

All Custom Calling and CLASS (except Voice Mail, Three Way Calling and Custom Ringing and excluding the custom calling features that are priced on a per call basis);

Unlimited Local Calling; and

Unlimited IntraLATA Calling.

**B. Usage Charges**

For interLATA toll calls in excess of allowance, see TALK.com=s toll tariff for Long Distance Bundle No. 4.

**C. Monthly Recurring Charge:**

Zone 1:	\$57.95
Zone 2:	\$62.95
Zone 3:	\$62.95

(N)

(N)

Issue Date: February 20, 2001

Effective Date: March 22, 2001

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